Brunsfield Construction Sdn Bhd v LDE Aluminium Industries Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(W)-782–04 OF 2018
ABDUL RAHMAN SEBLI, MARY LIM AND HASNAH HASHIM JJCA
19 JUNE 2019

Civil Procedure — Trial — Role of judge — Whether trial judge grossly failed to evaluate oral and documentary evidence adduced at trial — Whether trial judge wrongly allowed plaintiff's claim by merely invoking principle of estoppel against defendant — Whether trial court should have appreciated that plaintiff's claim based purely on progress claim document without supporting documents — Whether evidence at trial established that amounts stated in progress claim only provisional and that actual amount payable could only be determined after both parties jointly carried out on-site measurements to assess actual work done and quantities and costs of materials used — Whether trial court wrongly found that defendant's silence and inaction on receiving plaintiff's progress claim meant it had admitted contents of the document

The appellant had engaged the respondent to carry out certain subcontract works on a building project. Following the completion of the project, the respondent sued the appellant in the High Court for payment of RM873,482.84 which, it contended, was the balance owing to it under its 27th (and final) progress claim ('PC 27'). In its defence, the appellant averred that what was contained in PC 27 were only provisional figures and that any amount payable to the respondent could only be determined — as was practised throughout the duration of the subcontract — after both parties had carried out a joint measurement on site of the quantities and values of work done. The appellant submitted that PC 27 alone, without the joint site measurements and any other supporting documents, was insufficient to prove that the sum claimed by the respondent was due and payable. The appellant said that since the respondent did not produce any other documents apart from PC 27 to support its claim and also failed to participate when the appellant carried out assessment of the final account on site, the respondent was bound by the final account ('exh D50') that the appellant had produced at trial which took into account all relevant factors and determined that what was due to the respondent was only RM55,115. The appellant, however, rejected that figure. Clause 13.2 of the contract provided that if the respondent failed to be present for the joint site inspection/valuation, the valuation done by the appellant 'shall be deemed final'. The instant appeal was against the High Court's allowing of the respondent's claim with interest at the rate of 8%pa. The trial court decided the case largely by applying the principle of estoppel. The trial judge ruled that

the appellant's failure to plead non-receipt of the PC 27, its failure to reply to a letter from the respondent attaching a summary of progress claims and payments it had received, the failure to dispute or protest against PC 27 and choosing to remain silent amounted to acceptance/admission of what was contained in PC 27. The judge ruled that in view of its conduct, the appellant was estopped from disputing the contents of PC 27 at the trial.

Held, unanimously allowing the appeal, setting aside the decision of the High Court and dismissing the respondent's claim:

(1) The High Court judge plainly erred in failing to evaluate the evidence before him and in applying the principle of estoppel to decide the case. The documentary evidence did not support his decision. The judge erred in using PC 27 as proof of actual work done and materials supplied on site. The respondent had to prove the detailed makeup of PC 27. It was not a speaking document that was capable of the construction and purpose given to it by the trial judge. There was sufficient merit in the appeal to warrant appellate intervention (see paras 49 & 51).

(2) PC 27 was a mere summary of the subcontract and variation works with no supporting documents attached. The respondent was obliged to submit together with the progress claim, relevant supporting documents for the appellant's consideration. The respondent had the burden of proving each and every item in PC 27, more so where the actual quantity and value of works had not been inspected and measured on site under the terms of the underlying contract between the parties. Merely tendering PC 27, without more, was far from sufficient to prove the respondent's claim (see paras 44–45 & 47).

(3) The trial judge failed to consider sufficiently, or at all, the appellant's defence and the testimonies of the witnesses at the trial. The defence stated that there was a prescribed procedure under the terms and conditions of the contract between the parties for progress claims to be valued on site before payment was made. That procedure was adhered to throughout the duration of the subcontract. All previous payments to the respondent in respect of its progress claims Nos 1–26 had complied with this agreed procedure. The witnesses, especially SP1, SP2 and SP3 had also testified that the amounts stated in the progress claims submitted were only provisional in nature and the final amount payable was subject to change during the joint on-site measurement where the actual work done and materials supplied would be physically ascertained. None of these matters were considered by the trial judge. If he had considered them, he would have found that the respondent had failed to prove its case on balance of probabilities (see paras 18–19, 28–29 & 31).

(4) Clause 13.2 of the letter of award entitled the appellant to conduct the final unilateral site inspection (the respondent failed to participate in it)

leading to its certification of the relevant progress claim. The parties had contractually agreed that such valuation was 'deemed final'. This therefore rendered PC 27 questionable and lacking in credibility. The appellant's final account (exh D50) therefore had to be treated as the only evidence of the actual work done and materials installed on site. The final account, which had taken into account all material factors, stated that only RM55,115 was remaining due to the respondent. This whole factual matrix, as testified by the appellant, and corroborated by contemporaneous documentary evidence was not at all considered by the trial judge. Such evidence was both material and relevant to the determination of the respondent's claim (see paras 37–39 & 42).

(5) The trial judge had awarded interest at the rate of 8%pa on the sum awarded. This was contrary to the rate fixed under practice direction No 1 of 2012, which was 5% (see para 50).

(6) It was the duty of the trial court to evaluate the evidence led, to consider the oral testimonies against any documentary evidence produced by either party, to give proper weightage to all evidence, to explain why certain pieces of evidence were discarded or had overall bearing and value, and to deliberate on the arguments made and apply the relevant law to the facts. It could not be a case of just accepting the contents of a document, without more, and citing the principle of estoppel as was done by the trial judge here (see paras 15–16).

[Bahasa Malaysia summary

Perayu telah melantik responden untuk melaksanakan subkontrak tertentu untuk projek pembinaan. Berikutan penyempurnaan projek itu, responden menyaman perayu di Mahkamah Tinggi untuk pembayaran RM873,482.84 yang, dipertikaikan, adalah baki yang terhutang di bawah tuntutan kemajuan ke-27 (dan terakhir) ('PC 27'). Dalam pembelaannya, perayu menegaskan bahawa apa yang terkandung dalam PC 27 hanyalah angka sementara dan apa-apa amaun yang perlu dibayar kepada responden hanya dapat ditentukan — seperti yang diamalkan sepanjang tempoh subkontrak — selepas kedua-dua pihak telah melakukan pengukuran bersama di tapak berkenaan kuantiti dan nilai kerja yang dilakukan. Perayu mengemukakan bahawa PC 27 sahaja, tanpa pengukuran tapak bersama dan mana-mana dokumen sokongan lain, tidak mencukupi untuk membuktikan bahawa jumlah yang dituntut oleh responden adalah kena dibayar dan perlu dibayar. Perayu mengatakan bahawa sejak responden tidak mengemukakan dokumen lain selain PC 27 untuk menyokong tuntutannya dan gagal turut serta apabila perayu melakukan penilaian atas akaun akhir di tapak, responden terikat oleh akaun akhir ('eksh D50') bahawa perayu telah kemukakan di perbicaraan yang mengambil kira semua faktor yang berkaitan dan menentukan bahawa apa yang terhutang kepada responden hanya RM55,115. Walau bagaimanapun, perayu menolak angka itu. Klausa 13.2 kontrak itu menyatakan bahawa jika responden gagal

A hadir untuk pemeriksaan/penilaian tapak bersama, penilaian yang dilakukan oleh perayu 'hendaklah dianggap muktamad'. Rayuan ini adalah terhadap Mahkamah Tinggi yang membenarkan tuntutan responden dengan faedah pada kadar 8% setahun. Mahkamah bicara memutuskan perkara itu sebahagian besarnya dengan menggunakan prinsip estoppel. Hakim bicara B memutuskan bahawa kegagalan perayu untuk memplid tidak menerima PC 27, kegagalannya untuk membalas surat daripada responden yang menyertakan ringkasan tuntutan kemajuan dan pembayaran yang telah diterima, kegagalan untuk mempertikai atau membantah terhadap PC 27 dan memilih untuk tetap senyap berjumlah penerimaan/pengakuan apa yang C terkandung dalam PC 27. Hakim memutuskan bahawa memandangkan tingkah lakunya, perayu telah diestop daripada membantah kandungan PC 27 pada perbicaraan.

D **Diputuskan**, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan menolak tuntutan responden:

(1) Hakim Mahkamah Tinggi jelas terkhilaf dalam gagal untuk menilai keterangan di hadapannya dan menerapkan prinsip estoppel untuk memutuskan kes itu. Keterangan dokumentari tidak menyokong E keputusannya. Hakim terkhilaf dalam menggunakan PC 27 sebagai bukti kerja yang sebenarnya dilakukan dan material yang dibekalkan di tapak. Responden perlu membuktikan kandungan terperinci PC 27. Ia bukanlah satu dokumen yang mampu menghasilkan pembinaan dan tujuan yang diberikan kepadanya oleh hakim bicara. Terdapat merit yang F mencukupi dalam rayuan untuk membenarkan campur tangan rayuan (lihat perenggan 49 & 51).

(2) PC 27 hanyalah ringkasan subkontrak dan kerja-kerja pengubahan tanpa dokumen sokongan yang dilampirkan. Responden dikehendaki untuk mengemukakan tuntutan kemajuan, dokumen sokongan yang relevan G untuk pertimbangan perayu. Responden mempunyai beban untuk membuktikan setiap item dalam PC 27, lebih-lebih lagi di mana kuantiti dan nilai sebenar kerja tidak diperiksa dan diukur di tapak di bawah terma kontrak dasar antara pihak-pihak. Dengan hanya mengajukan H PC 27, tanpa lebih, adalah jauh dari mencukupi untuk membuktikan tuntutan responden (lihat perenggan 44–45 & 47).

(3) Hakim bicara gagal mempertimbangkan secukupnya, atau sama sekali, pembelaan perayu dan testimoni saksi pada perbicaraan. Pembelaan menyatakan bahawa terdapat prosedur yang ditetapkan di bawah terma I dan syarat kontrak antara pihak-pihak untuk tuntutan kemajuan yang akan dinilai di tapak sebelum pembayaran dibuat. Prosedur itu dipatuhi sepanjang tempoh subkontrak. Semua bayaran terdahulu kepada responden berkenaan dengan tuntutan kemajuan No 1–26 telah dipatuhi prosedur yang dipersetujui ini. Saksi-saksi, terutamanya SP1,

SP2 dan SP3 juga telah memberi keterangan bahawa jumlah yang dinyatakan dalam tuntutan kemajuan yang dikemukakan hanya bersifat sementara dan amaun akhir yang dibayar akan berubah semasa pengukuran di tapak bersama di mana kerja sebenar dan material dibekalkan akan ditentukan secara fizikal. Tiada satu pun perkara ini dipertimbangkan oleh hakim bicara. Sekiranya beliau mempertimbangkannya, beliau akan mendapati bahawa responden gagal membuktikan kesnya di atas imbangan kebarangkalian (lihat perenggan 18–19, 28–29 & 31).

(4) Klausa 13.2 surat award memberi hak kepada perayu untuk menjalankan pemeriksaan tapak unilateral terakhir (responden gagal mengambil bahagian di dalamnya) yang membawa kepada pengesahan tuntutan kemajuan yang berkaitan. Pihak-pihak telah bersetuju bahawa penilaian itu 'dianggap muktamad'. Oleh itu ditafsirkan PC 27 boleh dipersoalkan dan kekurangan kredibiliti. Oleh itu, akaun akhir perayu (eksh D50) harus dianggap sebagai satu-satunya keterangan kerja sebenar dan material yang dipasang di tapak. Akaun akhir, yang telah mengambil kira semua faktor penting, menyatakan bahawa hanya RM55,115 yang perlu dibayar kepada responden. Matriks keseluruhan fakta kes ini, sebagaimana yang diperakui oleh perayu, dan disahkan oleh keterangan dokumentari semasa tidak dipertimbangkan oleh hakim bicara. Keterangan sedemikian adalah sama-sama material dan berkaitan dengan penentuan tuntutan responden (lihat perenggan 37–39 & 42).

(5) Hakim bicara telah memberikan faedah pada kadar 8% setahun atas jumlah yang diberikan. Ini bertentangan dengan kadar yang ditetapkan di bawah arahan amalan No 1 Tahun 2012, iaitu 5% (lihat perenggan 50).

(6) Adalah menjadi kewajipan mahkamah bicara untuk menilai keterangan yang diberikan, untuk mempertimbangkan testimoni lisan terhadap apa-apa keterangan dokumentari yang diajukan oleh mana-mana pihak, untuk memberikan wajaran yang tepat kepada semua keterangan, untuk menjelaskan mengapa keterangan tertentu dibuang atau mempunyai keseluruhan nilai, dan membincangkan hujahan yang dibuat dan menggunakan undang-undang yang berkaitan dengan fakta-fakta. Ia tidak boleh menjadi kes yang hanya menerima kandungan dokumen, tanpa lebih, dan memetik prinsip estoppel seperti yang dilakukan oleh hakim bicara di sini (lihat perenggan 15–16).]

Notes

For cases on role of judge, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 10967–10972.

Cases referred to

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal [2015] MLJU 2247; [2016] 2 CLJ 563, CA (refd)

Dekon Sdn Bhd v Pembinaan Asas Klasik [2017] 6 MLJ 715; [2017] 1 LNS 888, CA (refd)

Hasrat Idaman Sdn Bhd v Mersing Construction Sdn Bhd [2015] 11 MLJ 464, HC (refd)

Appeal from: Civil Suit No 22–780 of 2010 (High Court, Penang)

Abdul Rashid bin Ismail (Azreen bt Ahmad Rastom with him) (Rashid Zulkifli) for the appellant.

Michael Khoo (Lim Hock Siang with him) (Sunny Khoo & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This is an appeal against certain parts of the decision of the High Court rendered on 16 March 2018. At the High Court, the respondent's claim was allowed with interest at the rate of 8%pa after the High Court had acknowledged and found that the appellant was entitled to deduct a total sum of RM1,059,491.59 in respect of 16 debit notes issued by the appellant for purchase of materials and back-charges for costs incurred on behalf of the respondent. There is no appeal on the appellant's deductions; the appeal only concerns the High Court's decision to allow the respondent's claim.

[2] After hearing learned counsel and upon careful consideration of the submissions against the records of appeal and the applicable law, we unanimously allowed the appeal. These are our reasons.

[3] The appellant was the main contractor in a project known as the 'Construction of Main Hospital Building and External Works for the Design, Construction, Equipping, Commissioning and Maintenance of Alor Setar Hospital, Kedah Darul Aman' ('the project'). The project was awarded by the Government of Malaysia to a company known as MH Projects Sdn Bhd who in turn awarded the project to the appellant.

[4] By letter of award dated 21 April 2004, the appellant awarded certain subcontract works to the respondent, namely to 'Supply and Install of Ceiling Work' for the sum of RM3,542,000. Vide letter of confirmation of variation order work No 1 dated 21 May 2004, the respondent was also required to carry out certain variation works, that is, 'Supply and Install SG Mirror & Aluminium Door Frame Infilled with Timber to Toilet Cubicle' for a sum of RM315,491.23. Both the letter of award and the letter of confirmation of

variation order work No 1 form the underlying contract between the disputing parties.

[5] The project was completed on 28 February 2007 and a certificate of completion was issued on 14 March 2007. The defects liability period of 24 months ran from 28 February 2007–27 February 2009. The respondent claimed that it had completed all works including the variation works within the stipulated extended time frame and that its works were in accordance with the standard and quality required.

[6] Now, the original date of completion was actually 30 July 2004. As we can see, this date of completion was extended to some three years later. The reasons behind the extension(s) are of no particular relevance in this appeal save to acknowledge that such extensions took place as nothing turns of it. Similarly, the matter of the quality of the respondent's works and whether defects in such works were duly rectified are also of no particular relevance because of the narrow compass of issues canvassed in the instant appeal.

[7] What is of concern in this appeal is the respondent's claim for payment of balance monies due for work done or completed which was allowed by the High Court on account that it was proved. The respondent claimed that it had issued 27 progress claims in the course of the works for which it had been paid only up to the 26th progress claim. Its last progress claim, progress claim No 27 dated 8 April 2006 ('PC 27') was for the sum of RM3,912,990.28. According to the respondent, accepting that the appellant had, at the request of the respondent, purchased materials for the respondent totaling RM958,306.40, there was still a sum of RM2,954,683.88 due from the appellant. Since the appellant had paid the respondent only a total sum of RM2,081,201.04, there is still a balance sum of RM873,482.84 due from the appellant. The respondent's claim at the High Court was for that sum. The respondent tendered PC 27 ('exh P2') as evidence of its work and claim.

[8] In defence, the appellant contended that, as per the terms and conditions of the letter of award and the letter of confirmation of variation order work No 1, the quantity and value of the subcontract works and the variation orders are only provisional and subject to joint measurement on site upon the respondent's submission of progress claims for work done. Representatives of the contracting parties would attend these joint site measurements in order to measure the actual quantity of work done. Payment to the respondent is then made upon verification and certification after such joint site measurements.

[9] The appellant contended that the progress claims including PC 27 submitted by the respondent for payment do not reflect or are insufficient to prove the actual amount and value of the total work done by the respondent. As

A explained, the joint site measurements that are provided in the letter of award is to cater specifically for that concern.

[10] It was the contention of the appellant that PC 27 is a unilateral and uncertified claim for which relevant and related documentation, required B under the terms and conditions of the letter of award must also be produced to support the claim in PC 27, were not submitted together with the claim. Since none was produced, the appellant contended that the respondent must be bound by the final account that the appellant had issued. The final account was C produced at trial and marked as exh D50.

[11] In that final account, after taking into account the measurements on site as done by the appellant and after deducting for purchase of materials and back-charges, the amount due to the respondent is a sum of RM55,115. It D seems the respondent had requested the appellant to purchase the materials for the subcontract works on its behalf as it had financial difficulties at the material time. The back-charges were incurred by reason of rectification or repair works, replacement of defective or damaged materials, rental of equipment, general maintenance of the site during rectification or repair works arising from or E caused by the respondent. Debit notes were raised at the material time to cover for these purchases and back-charges. A cheque for RM55,115 was sent to the respondent through the appellant's solicitors. It was, however, rejected and returned.

F **[12]** The learned judge found the respondent's claim proved after having 'done a close and careful examination of all the evidence presented'; disagreeing with the appellant that the uncertified PC 27 cannot be accepted as proof of the respondent's claim. The learned judge found that the appellant's failure to plead non-receipt of PC 27, to reply to the respondent's letter dated 2 March G 2007 attaching a summary of progress claims and payment received, and to dispute or complain about PC 27; or even call for a joint valuation; choosing instead to remain silent and not protest, and deliberately by conduct ignored the exh P31, 'To me, the Defendant have acted to their detriment. By failing to [sic] response, the Defendant could be [sic] assume to have accepted or agreed H to the amount or quality of the work done by the Plaintiff as reflected in the said Progress Claim No 27'.

[13] The learned judge found that the appellant was 'stop from questioning the said progress claim. I registered my surprise at the conduct of the I defendant's for not taking steps to dispute the content of the letter by the plaintiff namely P31 ... It is reasonable to expect a prompt or vigorous denial but there was no response whatsoever from the defendant ... I wish to make it clear that I am prepared to say that silence upon receipt of exh P31 should be [sic] construe and treated as an admission of the contents of the said exh P31

stand unrebutted as the defendant did not filed any letter to counter P3'. A

[14] In the light of those facts, the learned judge found the respondent's 'final account' remained undisputed and that its 'Interim certificate Progress Claim No 27 (merely estimate and are not final) which was submitted to the [sic] defendant's can be considered as the final amount payable after due regard to all the circumstances of the case'. In short, the learned judge applied the principle of estoppel to prevent the appellant from contesting the validity and role of PC 27, that because the appellant did not plead non-receipt of PC 27, it could not now raise it at the trial; that because it did not respond or dispute PC 27 at the material time, it must be taken to have accepted it and is now estopped from contesting PC 27. B C

[15] With respect, we disagree. While justice is always the overriding consideration, doing justice requires every court to examine evidence presented, deliberate on the arguments made and apply the relevant legal principles to the facts. It cannot be a case of accepting the contents without more, citing the principle of estoppel, as was done by the learned judge. D

[16] It is the duty of the trial court to evaluate evidence led, in particular, consider the oral testimonies against any documentary evidence produced by either party; give proper weightage to all evidence, and explain why certain pieces are discarded or have overall bearing and value. It is not enough to say that there has been a close and careful examination of all the evidence presented but offer no explanation or reasoning on that evaluation save to deal with the issues for determination from just a point of pleading. E F

[17] Even in that regard, we find that the learned judge had in fact misapprehended the issue that was raised by the appellant. G

[18] In considering the issue of whether the respondent had proved its claim and was entitled to payment for work done, it was incumbent on the trial judge to take into consideration the defence to the claim. The appellant's defence or case was not so much that it did not receive PC 27 but that there was a prescribed procedure under the terms and conditions of the underlying contract for valuation and payment of work done; that that procedure had prevailed and had been adhered to throughout the duration and progress of the works; that the respondent's works prior to the impugned PC 27 had always been valued and certified before payment; and that the certified payments made by the appellant had been received by the respondent without protest. This is all clearly pleaded in the defence. In any event, the respondent's pleas that it had submitted 27 progress claims (see para 5 of the amended statement of claim) is in fact denied by the appellant (see para 4 of the re-amended defence). H I

[19] This material defence was not considered at all by the learned judge. We have had a look at the relevant terms of the underlying contract between the parties, which examination surely was an exercise that must necessarily be undertaken in order to determine the issue of whether the respondent was entitled to payment for PC 27. Unfortunately, we do not find this done at all by the learned judge.

[20] We have also taken on board the testimonies of the witnesses called at trial; again, an exercise that does not appear to have been undertaken by the learned judge at all. While it is not for the appellate court to be making findings of fact, as that is the function of the trial court, that exercise needs to be undertaken where there is a failure to do so in the first place. The appellate court has to decide whether the decision of the trial court is still sustainable in the face and against the weight of the evidence produced but not evaluated, or not evaluated properly by the court of first instance.

[21] Having done all that, this is what we found.

[22] Now, the underlying contract between the parties is to be found in the letter of award dated 21 April 2004. Proper and due regard must be accorded to the terms and conditions of this contract when determining the claim and defences raised. At the end of the day, the respondent's claim for balance due for work done is still a contractual claim arising from the respondent's performance of the subcontracted works and variation works as found in the letter of award and the letter of confirmation.

[23] The value of those subcontract works is not on a fixed or lump sum basis; rather it is provisional. In respect of the subcontract works and the formalised variation work, the provisional sums were RM3,542,000 and RM315,491.23 respectively. It is provisional in that the sums will be 'adjusted for any work done certified for the period ...' and that the value in the letter of award would not reflect the final value of the actual work done. The payment of the sums due to the respondent is also upon certification by the appellant — see item (g) in the letter of award.

[24] For the purpose of this appeal, the relevant provisions of the letter of award are cll 13, 14 and 17.

[25] Clause 13 contains a specific procedure to be followed when it comes to progress claims. Under cl 13.2, there is provision for joint site valuation where in the event the respondent 'fail to be present for the joint site inspection, the valuation conducted by us shall be deemed final'.

[26] Clauses 4.14 and 17.3 of the letter of award read as follows:

4. Submission of Documents

4.1 The Total Sub-Contractor is required to submit promptly to us the following:

4.11 A site organization ...

4.12 All the necessary samples ...

4.13 Shop Drawings and Method Statements to be approved ...

4.14 Seven (7) copies of the As-built Drawings, seven (7) copies of the Operating Manual, seven (7) copies of the Maintenance Manual and seven (7) copes of the Warranty Letter upon completion of your scope of work.

17. Variations

17.1 You shall make such variation ...

17.2 All quotations for variation ...

17.3 Submission of additional work claims must be supported by a complete set of measurements and other necessary documents such as AI, EI, Contract drawings, As-built drawings, Certified day work sheet, quotation, cost break-down, certification of work done by our authorized representative and etc.

[27] Several key points were made by the appellant on the reading and construction of the letter of award, in particular on cl 13.2, valuation of progress claims and the preparation of the final account.

[28] First, the witnesses called by both parties testified that there were valuations of the progress claims submitted because the claims were provisional and the final amount payable was subject to change during the final joint site measurement where the actual work done and materials supplied would be physically ascertained on site. See testimonies of SP1, SP2 and SP3, that the amounts mentioned in the letter of award are only provisional and subject to measurement on site. Thus, the value and actual work done by the respondent was still a matter of measurement ascertained at site through the conduct of joint measurements.

[29] Second, the total sum of RM2,081,897.92 that was paid for progress claims Nos 1–26 were all in accordance with this agreed procedure.

[30] Third, that despite being notified orally, as was the practice at site, the respondent failed to attend some of these valuation inspections. At the trial, there was evidence produced showing that a total of 24 site valuations were conducted for the 26 progress claims received by the appellant. Of these, 16 were undertaken jointly by both parties whereas eight were undertaken in the absence of the respondent.

[31] Neither of these key points nor even the terms and conditions of the letter of award were considered by the learned judge. Had that been undertaken, the learned judge would have found, as we have, that the respondent's case was not proved, even on a balance of probabilities.

[32] In relation to the final account, the respondent has questioned its authenticity, suggesting that it was created only after the respondent's claim was filed on 16 November 2010; that it surfaced four years after the works had been completed and PC 27 had been submitted. It was suggested that it was therefore not a contemporaneous document, unlike PC 27, and that as a unilateral document created after the respondent's claim was filed, has no probative value, was totally unreliable and was rightly disregarded by the learned judge. The final account is referred to as certificate 25 dated 4 January 2011 in the respondent's submissions.

[33] The learned judge had agreed with the respondent and had found that because the appellant had not responded at the material time to PC 27 and also to the respondent's letter dated 2 March 2007 (exh P31) that the appellant was estopped from challenging the respondent's claim.

[34] Once again, with respect, we must disagree with the learned judge. The respondent's line of submission is unsustainable given the following. In terms of chronological sequence, the parties had in fact embarked on a joint site measurement for the purpose of measuring the actual value and quantity of the respondent's final works prior to the respondent's letter of 4 January 2007. This exercise of conducting joint site measurement and preparing the final account actually took place on 30 August 2006.

[35] This final account prepared by SD6 was carried out according to the agreed terms and conditions of the letter of award. For the purpose of preparing a final account, a final valuation had to be conducted and evidence was led to show that this was started on 30 August 2006. The appellant's representative, Kelvin Lim Chin Kooi ('SD6') and the respondent's representative, Zahirrudin bin Zainal Abidin ('Zahir') took part in this exercise; this is evidenced by their signed working sheets prepared for this purpose — see pp 2296–2304 of the record of appeal and exh D52.

[36] Zahir, however, did not subsequently attend and complete that final joint site measurement. SD6 testified that Zahir had told him that the respondent's management did not want Zahir to proceed with the final joint site measurement process. So, SD6 went ahead with and completed on his own, the final joint site measurement. SD6 then went on to prepare the final account ('exh D50') in 2008, based on this measurement.

[37] In such circumstances, cl 13.2 of the letter of award entitles the appellant to conduct a unilateral site inspection leading to its certification of the relevant progress claim; and that the valuation so conducted is agreed 'shall be deemed final'. This then renders the respondent's PC 27 questionable and lacking in credibility.

[38] As for the contents of the final account (exh D50), it must therefore be treated as the only evidence of the actual work done and materials installed on site. According to the final account, the total work done by the respondent, that is, for the supply of labour, material, machinery and tools for the complete installation of the following works in accordance with specification of main contract and subject to the satisfaction of Jabatan Kerja Raya, was in the sum of RM2,968,025.28. As for the total work done for the variation orders, the appellant had certified that the amount payable to the respondent was in the sum of RM228,479.23. The appellant had provided the breakdown of the actual work done and materials installed on site in respect of the respondent's subcontract works and the variation orders together with the requisite as-built drawings — see pp 2221–2291 of the record of appeal Vol 2/11.

[39] Further, the final account states that only a sum of RM55,115 is due to the respondent. This sum was arrived at after taking into account the appellant's purchase of materials for the respondent and which were reflected in the debit notes tendered at trial. Those debit notes were accepted by the learned judge and there is no appeal by the respondent on this aspect.

[40] SD6 had testified that the final account was sent to the respondent for signing. Zahir refused to sign the final account. In 2009, when SD6 followed up with the respondent's signing of the final account, he was asked by the respondent to email the same. The emails dated 11 January 2010, 13 January 2010 and 8 September 2010 forwarding the final account to the respondent's main witness, Eddie Leong (SP1) were tendered in evidence. The respondent did not respond. Another email for the same purpose was also sent to one Angeline at the respondent's office. It, too, went unanswered. The existence of Angeline was confirmed by SP1 as one of the respondent's staff at the material time. She was not called to testify.

[41] All this goes to show that the final account or certificate 25, though dated 4 January 2011, after the respondent's claim was filed, was in fact prepared and in existence long before the claim was actually filed.

[42] This whole factual matrix as testified by the appellant, corroborated with by contemporaneous documentary evidence was not at all considered by the learned judge. Such evidence was both material and relevant to the determination of the respondent's claim; and we are in full agreement with the

appellant that this error of the learned judge has rendered it necessary for this court to intervene.

[43] We have in any event, taken the trouble to examine PC 27 — exh P2. Having examined PC 27 dated 8 April 2006, we do not find it to hold any or any of the weight that was accredited to it by the learned judge. This is what is in PC 27:

Dear Sir,

PROJECT: CONSTRUCTION OF MAIN HOSPITAL BUILDING AND EXTERNAL WORKS FOR THE DESIGN, CONSTRUCTION, EQUIPPING, COMMISSIONING AND MAINTENANCE OF ALOR SETAR HOSPITAL, KEDAH DARUL AMAN (660 BEDS)
-27th Progress Claim — Final

We refer to the above project and wish to apply for our progress payment as the following:

ORIGINAL CONTRACT VALUE:	3,542,000.00
VARIATION ORDER: (Refer to Appendix A)	0.00
REVISED CONTRACT VALUE:	3,418,155.60

TOTAL VALUE OF WORKDONE (Refer to Appendix A)	3,418,155.60
VARIATION ORDER	494,834.68
MATERIAL ON SITE	–
Less: 5% RETENTION SUM	195,649.51
	3,717,340.77
Less: MATERIAL SUPPLY BY YOU	958,306.40
Less: PROGRESS PAYMENTS RECEIVED (Payment No 1–22)	1,968,372.23
BALANCE DUE TO US	790,662.14

[44] It is obvious from the above that PC 27 is a mere summary of the subcontract works and variation works, with no supporting documents attached; as is typically seen in the other 26 progress claims submitted by the respondent. The respondent is obliged under cll 4.14 and 17.3 of the letter of award to submit together with the progress claim, relevant supporting documents for the consideration of the appellant.

[45] The filing of a claim to enforce its rights does not absolve the respondent from having to comply with the terms and conditions of the letter

of award. The respondent is still obliged to show that its claim is within the agreed terms; it is never the function of the court to rewrite terms and conditions of contract. To be successful, the respondent must bring itself within the terms of the letter of award, show compliance and proof of work done. Tendering PC 27, without more, in our respectful view, is far from being sufficient for that purpose; and this was not properly considered by the trial judge.

[46] Bearing in mind that PC 27 is the respondent's final claim, there is still the matter of joint site measurement to measure the value and quantity of the respondent's actual works. No evidence was adduced by the respondent that it had requested for such measurement, and that the same had been refused. Or, that the respondent had itself conducted a measurement on site and PC 27 reflects the records taken at such measurement. We, therefore agree with the appellant that the respondent was always obliged to show that its claim is within the four corners of the letter of award.

[47] Further, the respondent as claimant, bears the burden of proving each and every item in PC 27. More so where the actual quantity and value of works have not been inspected and measured on site under the terms of the underlying contract between the parties. Authorities to this effect may be found in the cases of *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal* [2015] MLJU 2247; [2016] 2 CLJ 563, *Dekon Sdn Bhd v Pembinaan Asas Klasik* [2017] 6 MLJ 715; [2017] 1 LNS 888 and *Hasrat Idaman Sdn Bhd v Mersing Construction Sdn Bhd* [2015] 11 MLJ 464.

[48] In any case, PC 27 states that it is a sum of RM790,662.14 that is due to the respondent, and not the amount of RM873,482.84 awarded. As the single piece of evidence upon which the claim is pivoted, we should be able to find the sum claimed readily stated in that PC 27 too. It is not. Yet, it is the very basis upon which the learned judge had allowed the respondent's claim. It is only through further mathematical calculations that the sum of RM873,482.84 was awarded; there were further sums which had not been paid under the certified progress claims 1–26 and it is the inclusion of those sums that caused the amount awarded to be the sum of RM873,482.84, and not RM790,662.14, as stated in PC 27.

[49] We therefore agree with the appellant that the learned judge fell into error in invoking the principle of estoppel and using PC 27 as the proof of actual work and material supplied on site. The respondent was required to prove the detailed makeup of PC 27. Having examined PC 27, it is not a speaking document capable of the construction and purpose given by the learned judge.

[50] Finally, on the matter of interest. The learned judge had awarded interest at the rate of 8%pa from 30 January 2008 to the date of realisation or full settlement. This rate is contrary to the rate fixed under practice direction No 1 of 2012, that is, the rate of 5%.

[51] For all the foregoing reasons, there are obvious merits in this appeal. The learned judge was plainly in error in his application of the principle of estoppel and in the evaluation of the evidence before him. The decision reached was further not supported by the documentary evidence adduced. We therefore find sufficient merit in the appeal to warrant appellate intervention. The appeal is therefore allowed with costs and the decision of the High Court is set aside and the respondent's claim stands dismissed.

Appeal allowed with costs and the decision of the High Court is set aside.

Reported by Ashok Kumar